FILE COPY

No. 235

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1943

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner
for the State of Oklahoma,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of Respondent

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January, 1944

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Brief of Respondent

STATEMENT OF THE CASE

The statement of the case which appears on pages 2 to 8 of petitioner's brief is substantially correct. However, since the reference in the second paragraph thereof to petitioner's original entrance in Oklahoma in 1922 is

susceptible of being construed as a statement *concurred in by respondent* that the Great Northern Life Insurance Company was

(a) then licensed to do business in Oklahoma for a longer period than the license year ending February 28, 1923, and

(b) then a citizen in Oklahoma for a longer period than said license year,

we desire to call attention to the sixth paragraph of respondent's answer (R. 11-12) which clearly shows to the contrary.

Moreover, since the chief portion of petitioner's statement of the case consists of an incomplete abstract of the "Stipulation of Facts" (R. 20-23) on which this case was tried, respondent respectfully asks the court to carefully consider said stipulation and the exhibits attached thereto.

Said stipulation reveals that there is no issue in the cause of action set forth in petitioner's complaint *as to the proper construction of the 14th Amendment*, but that the only real or substantial issue involved in petitioner's complaint is whether the pertinent constitutional and statutory provisions of Oklahoma, when properly construed, require a foreign insurance company to pay annual premium taxes:

(a) as contended by petitioner, *not for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said *taxes are admittedly invalid* under said amendment, or

(b) as contended by respondent, *for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said taxes are *admittedly not invalid* under said amendment.

FIRST PROPOSITION

THE OBJECTION THAT THE UNITED STATES DISTRICT COURT DID NOT HAVE JURISDICTION OF THIS ACTION WAS RAISED IN PARAGRAPH 2 OF RESPONDENT'S ANSWER.

On pages 12 and 13 of petitioner's brief the converse of the above proposition is presented, it being specifically stated that

> "no point was made in the defendant's answer that the Federal Court did not have jurisdiction of either the person or of the subject matter",

However, by an examination of said answer (R. 11-13) it will be noted that the above issue was raised in Paragraph 2 thereof, as follows:

> "The complaint fails to state a claim against defendant upon which relief may be granted.",

it being our position, as will hereinafter be shown, that the respondent, Jess G. Read, is not being sued personally but as

> "Insurance Commissioner of the State of Oklahoma."

and that he is being so sued (same being, in reality, a suit against the State) under the purported authority of Section 12665, O. S. 1931 (quoted Appendix IV of petitioner's brief), in which section the State consented to be sued in courts of Oklahoma but not in courts of the United States.

That said proposition is properly raised under Paragraph 2, *supra* (same being analogous to a general demurrer), is shown by the case of *Scully* v. *Bird*, 209 U. S. 481, 52 L. ed. 899, wherein a former decision of the Supreme Court of the United States was quoted with approval which held that when an action was not filed against a named state *but against an officer thereof* who

> "desires to plead an exemption by reason of his *representative character*, he does not raise a question of jurisdiction in its proper sense . . . But whether this be a question of jurisdiction or not, *we think it should be raised either by demurrer to the bill* or by other pleadings in the regular process of the cause."

The above holding is in harmony with the general rule which appears in 25 Corpus Juris 783, same being as follows:

> "A contention that a federal court is without jurisdiction of an action against a state officer for the reason that the action is in effect against the state *should be raised by demurrer* or other pleading in the regular progress of the cause, * * *."

Moreover, that part of Rule 12(h) of the Federal Court Rules for District Courts of the United States

which relates to lack of jurisdiction of the subject matter of an action, was construed in the case of *Page* v. *Wright* (C.C.A. 7th Cir.-1940), 116 Fed. (2d) 449, the first and second paragraph of the syllabus being as follows:

> "The duty devolves upon federal court at any time jurisdictional question is presented to proceed no further until that question is determined.
>
> "*Jurisdiction cannot be conferred upon federal court by* agreement, *consent*, or collusion of the parties, whether contained in their pleadings or otherwise, and *a party cannot be precluded from raising jurisdictional question by any form of laches, waiver, or estoppel.*"

In the body of the opinion it is stated that

> "the phraseology contained in 12(h) 'jurisdiction of the subject matter,' and that in 12(b) (1) 'lack of jurisdiction over the subject matter' *in each instance includes 'diversity of citizenship.'* "

Therefore, if this cause of action is, in reality, a suit against the State of Oklahoma to which consent has not been given, or if such consent was given but said cause of action did not arise under the constitution or laws of the United States (as will hereinafter be shown), the trial court properly held (Paragraphs 1 and 2 of conclusions of law - R. 28) that by virtue of the 11th Amendment of the Constitution of the United States and 28 U. S. C. A., Section 41, as amended, it was without jurisdiction of this action, and this is true even though it be conceded that the instant objection was not raised

in respondent's answer and that by Paragraph 5 of said answer respondent admitted the allegations contained in Paragraph 1 of the complaint.

SECOND PROPOSITION

THIS ACTION INVOLVED HERE IS, IN REALITY, A SUIT AGAINST THE STATE OF OKLAHOMA BY A CITIZEN OF ANOTHER STATE, AND HENCE BROUGHT IN VIOLATION OF THE 11th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT SAID STATE HAS NOT CONSENTED TO BE SUED FOR THE RECOVERY OF TAXES PAID UNDER PROTEST EXCEPT IN ITS OWN COURTS.

The converse of the above proposition is presented on pages 12 to 25 of petitioner's brief. Said proposition, however, is supported by the first paragraph of the "Conclusions of Law" (R. 28) of the trial court herein (not referred to by the Circuit Court of Appeals) and hence said paragraph should be considered by this court in determining whether the trial court had jurisdiction herein.

This Action Is A Suit Against The State of Oklahoma

In connection with the above proposition it will be noted that Section 12665, Oklahoma Statutes 1931 (Section 9971, C. O. S. 1921), under the purported authority of which petitioner admittedly (see page 21 of petitioner's brief) brought this action, is as follows:

> "In all cases where the illegality of the tax is alleged to arise by reason of some action from which the law provides no appeal, the aggrieved

person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of 30 days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes, until the final determination of such suit. *All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein;* if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected; as not being due the state, county of subdivision of the county, *the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings,* and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

That an action filed against a State officer to recover taxes paid under protest, as provided in Section 12665, is, in reality, a suit against the State, and that in said section the State of Oklahoma waived its sovereign immunity from such a suit in courts thereof, is clearly shown by the case of *Antrium Lumber Company* v. *Sneed, State Treasurer* (Okla.-1935), 175 Okla. 47, 52 Pac. (2d) 1040 (stressed by respondent in both the trial and circuit courts but not referred to in petitioner's brief), wherein

the Supreme Court of Oklahoma held in the third paragraph of the syllabus, as follows:

> *"In this jurisdiction a suit for the recovery of illegal taxes is deemed to be in effect a suit against the state and consent to the maintenance of such a suit has been granted by section 12665 O. S. 1931* (Sec. 9971, C. O. S. 1921), and thereby the taxpayer is provided with an adequate, speedy, and exclusive remedy in all cases where the illegality of the tax is alleged to arise by reason of some action from which the law provides no appeal."

The above decision of the Oklahoma Supreme Court construing the meaning of Section 12665, *supra, is binding on this court.* By an examination of said section, *as so construed,* it will be found that suits filed thereunder to recover taxes paid under protest (such as the taxes involved here) are expressly held to be suits against the State, and that it is also held that under the provisions of said section the State waives its common law immunity from being sued in its own courts for the recovery of such taxes.

That this action is a suit against the State is further shown by the fact that while the protested payment sued for here is not deposited "in the General Revenue Fund of the State Treasury" (Paragraph 1 of stipulation - R. 20), it is deposited under the provisions of 62 O. S. 1941 §§ 74 and 75, in the Insurance Commissioner's Protest Fund or Account in the State Treasury. It will thus be noted that if petitioner recovers judgment herein same must be paid from moneys deposited in the Treasury of this State.

In this connection the Oklahoma court in the Antrium Lumber Company case construed Section 12665 as authorizing the filing of an action by a protesting taxpayer against the proper State tax collecting officer

> "to compel a refund of the alleged illegal tax to be made to it *out of the state* treasury,"

to-wit, out of said officer's protest fund or account in the State Treasury.

The State of Oklahoma Did Not Waive Its Immunity From Suit In Federal Courts

Nothing was said in the Antrium Lumber Company case as to the right of a taxpayer to file an action in the Federal Court to recover taxes paid under protest, under authority of Section 12665, *supra*. However, in view of the fact that it is a primary rule of statutory construction that

> "statutes in derogation of sovereignty should be strictly construed in favor of the state"

(59 C. J. 1141), which rule was followed by the Supreme Court of Oklahoma in the case of *Hawks, et al.*, v. *Walsh, et al.*, 177 Okla. 564, 61 Pac. (2d) 1109 wherein it is stated

> "It is universally held that statutes permitting a state to be sued are in derogation of its sovereignty and will be strictly construed."

and since in Section 12665 the Legislature expressly provided that suits filed under authority thereof

> "shall have precedence"

in the courts in which the same are filed, and that said courts

"shall render judgment"

in the manner prescribed therein, *which procedural requirements the Oklahoma Legislature had authority to prescribe for actions in State courts but not in Federal courts*, it is not conceivable that when the Legislature enacted said section it intended to authorize the filing of actions to recover protested tax payments in Federal courts.

A somewhat similar statute of the State of California was held by this court in the case of *Smith* v. *Reeves*, 178 U. S. 436-41, 44 L. ed. 1140-43, to not authorize a suit against said State in Federal courts. In this connection the court held:

> "It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. *But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think is its meaning.* The requirement that the aggrieved taxpayer shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the County of Sacramento,' indicate that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals."

The principles of law announced in the Smith case,

supra, were followed in the case of *Chandler* v. *Dix*; 194 U. S. 590-91, 48 L. ed. 1029-31, wherein it is held:

> "The plaintiff relies upon the Public Acts of Michigan, 1899, act 97, adding § 144 to the general tax law of 1893. That act provides that 'the Auditor General shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made.' *But we are of opinion that if the forgoing words otherwise would apply to this case they should not be construed as expressing a waiver by the State of its constitutional immunity from suit in a United States Court. The provisions indicate that the Legislature had in mind only proceedings in the courts of the State.* A copy of the complaint is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the Auditor General, and this is to be in lieu of service of process. It then is left to the discretion of the Auditor General to cause the Attorney General to represent him, and it is provided that in such suits no costs shall be taxed. *These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control.* Of course, a taxpayer denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case here by writ of error from the highest courts of the State. *But the statute does not warrant the beginning of a suit in the Federal court* to set aside the title of the State. *Smith* v. *Reeves*, 178 U. S. 436, 445."

By an examination of petitioner's brief it will be found that the two cases above cited are not referred to, although the *earlier* case of *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1041, is cited (petitioner's brief 22-24) as holding contrary to respondent's position here. *However, it will be noted that the Texas Statute involved in the Reagan case had not theretofore been construed by the Supreme Court of Texas as authorizing a suit against the State* and that this court expressly stated (154 U. S. page 392) that the cause of action involved therein could not

> "in any fair sense be considered a suit against the State."

It will also be found that on pages 23 and 24 of petitioner's brief the Reagan case is cited as authority for the proposition that

> "whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense."

That this rule is not applicable when the action is directly or in effect against a sovereign State is clearly shown by the principles of law announced by this court in the Smith and Chandler cases, *supra*, wherein it was held that under the authorizing statutes involved therein the States of California and Michigan could be sued, respectively, in their own courts but not in Federal courts.

While it is true that Section 12665 has been con-

sidered by Federal courts, such as in decisions of this court reviewing decisions of the Oklahoma Supreme Court construing said section, and in injunction actions predicated upon the proposition that said section did not afford an adequate remedy at law, we have been unable to find any case going into the question as to whether the State of Oklahoma, by the passage of said section, waived its immunity under the 11th Amendment from being sued in Federal courts.

It will also be noted that an action, such as is authorized by Section 12665, is, in effect, a mandamus action. This, coupled with the fact that State courts but not Federal courts have jurisdiction in mandamus actions, supports our contention that in said section the State intended to waive its common law immunity from suit in courts of the State but not to waive its immunity under the 11th Amendment from being sued in courts of the United States.

That Federal courts do not have jurisdiction in actions "in the nature of mandamus" is admitted in the record of the "Pretrial Conference and Hearing" (R.-16), wherein the trial court stated in reference to petitioner's alternative prayer for

> "a decree in the nature of mandamus, commanding defendant to deliver to plaintiff, or cause to be repaid to it, the sum of eight thousand one hundred ninety-eight and 31/100 ($8,198.31) dollars."

that "I have no authority to issue a mandamus," to which Mr. Johnson, the attorney for petitioner, replied "We admit that * * *."

It was also stated in said pretrial conference and hearing (R.-15) that Section 12665 did not require taxes sought to be recovered thereunder to be paid "under coercion and duress" but only under protest (the payment under protest involved here being both alleged and admitted), whereupon the trial court stated to the attorneys, respectively, of respondent and petitioner that:

> "Then, we are not concerned with the coercion and duress at all. That will be the theory of the case from now on, and he is confined to it and you are confined to it too."

It would, therefore, appear that actions for the recovery of taxes paid under coercion or duress, which are not brought under authority of a statute expressly authorizing the recovery of taxes paid under protest, are not applicable here.

THIRD PROPOSITION

THE MATTER IN CONTROVERSY DID NOT ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

28 U. S. C. A. § 41, as amended, defines the original jurisdiction of district courts of the United States. Said section, in so far as same is pertinent to the issues involved here, is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "(1) Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and

"(a) arises under the Constitution or laws of the United States, * * * or (b) is between citizens of different States, * * *."

Therefore, if it be held that while this action is, in reality, a suit against the State, the State by Section 12665, not only waived its common law immunity from suit in its own courts but its immunity under the 11th Amendment from being sued in Federal courts, respondent desires to call attention to the fact that in such case *the trial court did not have jurisdiction of the subject-matter of this action* for the reason that while the amount sued for in petitioner's original complaint, exclusive of interest and costs, exceeded $3,000.00, the State of Oklahoma is not a citizen within the meaning of the above diversity of citizenship provision *and the matter in controversy did not arise under the Constitution or laws of the United States.*

In this connection it will be noted, that it is not contended by petitioner that the construction of any law of the United States is involved in this case, its sole contention being that the cause of action set forth in its original complaint arose under the 14th Amendment of the Constitution of the United States *for the reason that the constitutional and statutory provisions of Oklahoma under which the taxes involved here were collected, as said provisions are construed by petitioner, violate that part of said amendment which provides that no State shall*

"deny to any person within its jurisdiction the equal protection of the law."

It will also be noted from an examination of the

original complaint and the stipulation and briefs filed herein *that there is no issue* in the case at bar as to the proper construction of the 14th Amendment *but that the only real or substantial issue involved therein*, is, as aforesaid, whether the pertinent constitutional and statutory provisions of Oklahoma, when properly construed, require a foreign insurance company to pay annual premium taxes:

(a) as contended by petitioner, *not for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said taxes *are admittedly invalid* under said amendment,

or

(b) as contended by respondent, *for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said taxes *are admittedly not invalid* under said amendment.

In support of respondent's position as to the real jurisdictional issue above presented, attention is called to the general rule set forth in Vol. 1 of Hughes Federal Practice, page 407, § 551, where, under the subject "When Case Arises Under the Constitution," it is stated:

> "A case arises under the Constitution of the United States when some title, right, privilege, or immunity on which a recovery depends *will be defeated by one construction of that Constitution, or sustained by an opposite construction, or whenever the correct decision of the case depends upon the correct construction of the Constitution*, and a

federal court has jurisdiction of a bill, whether original or ancillary, which raises an issue involving constitutional rights, and may decide whether a federal statute is constitutional. *If the decision of a case does not necessitate the construction of the Constitution, it cannot be said to arise under the Constitution.*"

In the case of *Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209, this court held:

"Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. *If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States. Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Starin* v. *New York*, 115 U. S. 248, 257. In *Carson* v. *Dunham*, 121 U. S. 421, it was ruled *that it was necessary that the construction either of the Constitution or some law or treaty should be directly involved in order to give jurisdiction.* * * *."

In support of the above quoted general rule from Vol. 1 of "Hughes Federal Practice" and under the subhead set forth in the 1943 cumulative pocket part of said volume entitled "Construction of State Constitution or State Statute", the case of *Heller* v. *Kreider* (C. C. A. Pa. 1938) 98 Fed. (2d) 106, and the case of *Metropolitan-Edison Co.* v. *Ickes, Admr.*, (D.C.D.C. 1938) 22 Fed. Supp. 639, are cited. Inasmuch as said cases are pertinent to the proposition involved here same are reviewed as follows:

In the case of *Heller, et al.*, v. *Kreider, supra,* wherein the action was brought by certain resident taxpayers to enjoin the directors of a school district from building a consolidated school house with the aid of federal funds on the ground that said construction was beyond the *statutory power* of the school district and said board (said action being apparently brought in the Federal court under the theory that the building of said school house would operate to deprive said taxpayers of their property without due process of law contrary to the provisions of the 14th Amendment and that hence said action arose under the Constitution of the United States), the court, in vacating the injunction granted by the trial court, held in the second paragraph of the syllabus, as follows:

> "The federal court had no jurisdiction of bill by taxpayers of township to enjoin township school directors from building consolidated school house with aid of federal funds where all parties were citizens of Pennsylvania and issue in the case was *statutory power* of school district acting by its directors to build the school and no federal question was involved."

In the case of *Metropolitan-Edison Co.* v. *Ickes, Adm'r, supra,* consolidated with two other cases (affirmed by this Court 204 U. S. 541, 82 L. ed. 1517), wherein an action was brought by the plaintiff, power companies, to enjoin said administrator from advancing funds for the purpose of financing the construction of certain municipal power projects on the ground that such construction was not authorized by *state law* (said action being apparently brought in the Federal court

under the theory that the financing of said power projects, with resulting competition, would operate to deprive said companies of their property without due process of law contrary to the provisions of the 14th Amendment and that hence said cause of action arose under the Constitution of the United States), the Court, in granting motions to dissolve the preliminary injunction granted in said case, held in the 4th paragraph of the syllabus, as follows:

> "The claim that a city has no right *under the state law* to accept a grant from a federal authority for the construction of a power project raises a question of state law which the state courts should decide."

The fact that the complaint herein does not reveal that the real and substantial issue involved in this case is based on a proper construction of the constitutional and statutory provisions of the State of Oklahoma, as aforesaid, and not of the 14th Amendment, is immaterial, since the challenge to the jurisdiction of the District Court in the case at bar was not raised by a motion to dismiss said complaint but at the conclusion of the trial under respondent's answer and the "Stipulation of Facts" herein.

In this connection it will be noted that under the principles of law announced in the "First Proposition" of this brief, the question of lack of jurisdiction of a Federal District Court *of a cause of action* pending before it may be raised at any time during the regular progress of the trial.

FOURTH PROPOSITION

THE ANNUAL TAX OF TWO PER CENT (SINCE APRIL 25, 1941, — FOUR PER CENT) COLLECTED ON THE OKLAHOMA PREMIUMS OF FOREIGN INSURANCE COMPANIES IS NOT AND NEVER HAS BEEN INVALID UNDER THE PROVISIONS OF THE 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY REASON OF THE FACT THAT A LIKE TAX IS NOT COLLECTED ON THE OKLAHOMA PREMIUMS OF COMPETING DOMESTIC INSURANCE COMPANIES.

On pages 33 to 53 of petitioner's brief, the converse of the above proposition is presented. However, it is significant to note (as will hereinafter be shown under the sub-head "Gross Premium Tax Laws of other States") that while the gross premium tax laws of not less than 29 of the 48 states discriminate heavily against foreign insurance companies, none of said laws have ever been held to violate the 14th Amendment of the Constitution of the United States or any other constitutional provision.

Stipulation of Facts

Inasmuch as petitioner in the concluding paragraph of its brief in the Circuit Court of Appeals expressly stated

> "If Section 1, Chapter 1a, Title 36, Page 121, Oklahoma Session Laws, 1941 (36 O. S. 1941, Section 104) is unconstitutional, since it merely amended Section 10478, O. S. 1931, which provided for a premium tax of 2%, *we assume the amended section of the statutes remains in full force*

> *and effect. Appellant has never objected to the payment of the 2% gross premium tax.* In such event appellant should be entitled to a refund of one-half of the $8,189.32 paid under protest, or the sum of $4,094.66."

thereby in effect abandoning its attempt to recover one-half of the 4% annual tax sued for in its complaint and thus tacitly admitting that said tax when levied at 2% did not violate the 14th Amendment, and since

> (a) we assume that petitioner has not abandoned its said position in the Circuit Court of Appeals from whose decision the instant appeal is taken (although petitioner's brief in this court is silent as to said position), and
>
> (b) under the Stipulation of Facts herein (R. 20-23) it is clear that if said 2% tax is not invalid by reason of being admittedly discriminatory said 4% tax is likewise not invalid by reason of also being admittedly discriminatory,

respondent desires before proceeding with its argument herein to specifically call attention to said stipulation, which, in so far as the proposition involved here is concerned, is as follows:

> "(2) That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or types of taxes to said state which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount the four per cent tax would bring on the premiums collected by said companies in this state, less proper deductions.

"(3) That during the period beginning November 16, 1907, and ending December 31, 1941, the total receipts of the Oklahoma Insurance Department from the two per cent tax on gross premiums of foreign insurance companies, and from the annual entrance and agents' fees of such companies, aggregate $25,585,107.34, while the expenses of said department during said period aggregate $910,107.34, said expenses being approximately 3.55 per cent of said total receipts, and that since December 31, 1941, said expenses are approximately only 2 per cent of the gross receipts thereof.

"(4) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires for the first time to do business in Oklahoma, *it is required*, among other things, to file an application for a license therefor, same to expire the succeeding last day of February (see true and correct copy of such an application attached hereto as 'Exhibit A'), and on or before said date, *to pay* a tax of two per centum (since April 25, 1941 — four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and that under the *uniform administrative interpretation* by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax of being paid for the right or privilege of entering Oklahoma and doing business therein to and including said last day of February, and a license issued by him to said company (see true and correct copy of such a license attached hereto as Exhibit 'B') as expiring by operation

of law and its express terms on said date. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

(5) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March 1 to and including the succeeding last day of February), desires to do business therein during the ensuing license year, *it is required*, among other things:

"(a) to file, on or before the last day of February of the current license year, an application for a license therefor (see true and correct copy of such an application attached hereto as 'Exhibit A'),

"(b) as a condition precedent, *to have paid* a tax of two per centum (since April 25, 1941 — four per centum), on all premiums, less proper deductions, which is received in Oklahoma during the preceding calendar year, and

"(c) on or before the last day of February of said succeeding license year, *to pay* a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year;

"and that under the *uniform administrative interpretation* of said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma

and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during said ensuing license year, and a license issued by him to said company (see true and correct copy of such a license attached hereto as 'Exhibit B'), as expiring by operation of law and its express terms at the end of said license year. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation."

Pertinent Constitutional Provisions

Sections 1 and 2, Article 19 of the Constitution of Oklahoma, are as follows:

"Section 1. *No foreign insurance company shall be granted a license or permitted to do business in this State until it* shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and *shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies,* and a refusal to pay such taxes or fees shall work a forfeiture of such license.

"Section 2. *Until otherwise provided by law, all foreign insurance companies,* including surety and bond companies, doing business in the State, except fraternal insurance companies, *shall pay to the Insurance Commissioner for the use of the State, an entrance fee as follows:*

"Each Foreign Life Insurance Company, *per annum,* two hundred dollars; each Foreign Fire Insurance Company, *per annum,* one hundred

dollars; each Foreign Accident and Health Insurance Company, jointly, *per annum*, one hundred dollars; each Surety and Bond Company, *per annum*, one hundred and fifty dollars; and Plate Glass Insurance Company (not accident), *per annum*, twenty-five dollars; each Foreign Life Stock Insurance Company, *per annum*, twenty-five dollars.

"*Unless otherwise provided by law, domestic companies excepted, each insurance company*, including surety and bond companies, doing business in this State, *shall pay an annual tax of two per centum on all premiums collected in the State*, after all cancellations are deducted, and a tax of three dollars on each local agent."

Pertinent Statutory Provisions

Section 10478, Oklahoma Statutes 1931, was enacted in 1909, shortly after statehood, and appeared as Section 6687, C. O. S. 1921. *Said section, prior to its amendment by Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941* (36 O. S. 1941 § 104), was as follows:

"Section 10478. *Every foreign insurance company* doing business in this state under the provisions of this article *shall, annually, on or before the last day of February, report* under oath of the president or secretary or other chief officer of such company to the insurance commission, *the total amount of gross premiums received in this state within the twelve months next preceding the first day of January* or since the last return of such premiums was made by such company; *and shall at the same time pay* the insurance commissioner *an entrance fee* as provided by Article XIX

of the Constitution of the State of Oklahoma, *and an annual tax of two per cent on all premiums collected in this state*, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, *supra* (quoted in "Appendix II" of petitioner's brief), effective April 25, 1941, amended said Section 10478, *the only material change therein being to raise said two (2%) per cent tax to four (4%) per cent.*

Section 10477, Oklahoma Statutes 1931 (36 O. S. 1941 § 56), relating to the *annual* statements and *annual* licenses *of both domestic and foreign insurance companies* doing business in this State, was enacted as a part of the 1909 General Insurance Act of Oklahoma. Inasmuch as said section clearly reveals that a "license or certificate of authority" issued to a foreign insurance company "shall expire on the last day of February next

after its issue," respondent is quoting said section herein, as follows:

> "The Insurance Commissioner shall, *in December of each year* furnish to each of the insurance companies authorized to do business under the provisions of this article two or more blanks in form adopted for their annual statement, *and such companies shall, annually, on or before the last day of February*, file in the office of the Insurance Commissioner a statement which shall exhibit its financial condition *on the thirty-first day of December of the previous year and its business of that year*. For good cause shown, the Commissioner may extend the time within which such statement may be filed. Every such annual statement shall be in the form of the specifications the Insurance Commissioner may require. The assets and liabilities shall be computed and allowed in accordance with the laws of this State. Such statement shall be subscribed and sworn to by the president and secretary and other proper officers. *And if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this state*, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, *and said certificate shall expire on the last day of February next after its issue.*"

Pertinent Conclusions of Law of the Trial Court

In relating to the proposition involved here respondent desires to call attention to the 6th, 7th and 8th paragraphs of the "Conclusions of Law" of the trial court

(R. 29-30) based on the above quoted paragraphs of the "Stipulation of Facts" herein, and the applicable law and decisions, which conclusions of law, as stated in the first paragraph of the syllabus of In re. Chicago & N. W. R. Co. (C.C.A. Ill., 1940), 110 Fed. (2d) 425, "are worthy of great consideration."

Administrative Interpretation and Practice of the Oklahoma Insurance Commissioner

The uniform administrative interpretation and practice of the Oklahoma Insurance Commissioner of and under the foregoing constitutional and statutory provisions since the effective date of the 1909 General Insurance Act of Oklahoma (33 years), as set forth in paragraphs 2 to 5, *supra*, of the "Stipulation of Facts", are in harmony with the principles of law announced in the following cases:

Philadelphia Fire Association v. *New York* (1886), 119 U. S. 110, 30 L. ed. 342;

New York Life Insurance Company v. *Board of Com'rs of Oklahoma County* (Okla.-1932), 155 Okla. 247, 9 Pac. (2d) 936;

The Lincoln National Life Insurance Company v. *Jess G. Read, Insurance Commissioner of Oklahoma, et al.*, (District Court, Oklahoma County, Okla.-1943), quoted in full on pages 35 to 38 of the Record herein;

Great Northern Life Insurance Company v. *Read, Insurance Commissioner of Oklahoma* (1943-appealed here), 136 Fed. (2d) 44, quoted in full on pages 39 to 46 of the Record herein;

Hanover Fire Insurance Company v. *Carr, Treasurer*, (formerly Harding, Treasurer), 272 U. S. 494, 71 L. ed. 372.

which cases are hereinafter discussed.

That said administrative interpretation and practice should not be disturbed "unless clearly wrong," is shown by the case of *United States* v. *La Motte*, 67 Fed. (2d) 788, wherein the 4th paragraph of the syllabus is, as follows:

> *"Construction of statute by Executive Department charged with its administration*, although not binding, will be respected by the court if question is doubtful or ambiguous and *will not be disturbed unless clearly wrong."*

However, in order that the court may clearly understand said interpretation and practice, both as to the issuance of an original license and of licenses for succeeding years, the following explanation is set forth:

> ISSUANCE OF ORIGINAL LICENSE. From an examination of (a) the constitutional and statutory provisions heretofore quoted, (b) the stipulation of facts herein, (c) the court decisions above mentioned, and (d) the uniform administrative interpretation and practice of the State Insurance Department since the effective date of the 1909 General Insurance Act, it appears that when a foreign insurance company desires, *for the first time*, to enter the State of Oklahoma and to do business therein, it is required:
>
> (a) to file an application for a license to do business in the State to and including the next succeeding last day of February (see

form of "Agreement and Application for License" on page 22 of record),

(b) to file the data required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101);

(c) to deposit the collateral required by law,

(d) to pay an "entrance fee" of from $25.00 to $200.00,

(e) *to pay*, on or before the next succeeding last day of February (see "Exception" in the Appendix hereof), a tax of two per cent (now four per cent) on all premiums, less proper deductions, which it received in the State after it enters the same and prior to the next succeeding first day of January *for the privilege of so entering Oklahoma and doing business therein from the date it so enters to and including the next succeeding last day of February*, and

(f) to agree to pay "all such [valid] taxes and fees as may at any time be imposed by law or act of the legislature."

When the requirements set forth in paragraphs (a), (b), (c), (d), (e) and (f), *supra*, have been met, the company is issued a license (see form of license on page 23 of record) entitling it to enter Oklahoma and do business therein from the date of said license to and including the next succeeding last day of February. Said license remains in effect until said date, that is, unless a refusal of said company to pay valid taxes or fees imposed upon it "by law or act of the Legislature," such as a refusal to pay valid ad valorem taxes on its real or personal property, "shall work a forfeiture

of such license" as provided in Section 1, Article 19, *supra*.

ISSUANCE OF LICENSES FOR SUCCEEDING YEARS. Said constitutional and statutory provisions, stipulation of facts, decisions, and administrative interpretation and practice, also reveal that if and when a foreign insurance company, which has been permitted to enter the State and to do business therein during any license year, desires to enter the State and to do business therein *during the succeeding license year*, it is required, on or before the last day of February of the then current license year:

(a) to file an application for a license to do business in the State from the following March 1st to and including the next succeeding last day of February (see form of "Agreement and Application for License" on page 22 of the record).

(b) to file the date required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101), the report required by Section 10474, *supra*, as amended (36 O. S. 1941 § 104), and the statement required by said Section 10477 (36 O. S. 1941 § 56),

(c) to deposit the collateral required by law,

(d) to pay an "entrance fee" of from $25.00 to $200.00,

(e) *to show payment* of a tax of two per cent (now four per cent) on all premiums, less proper deductions, which it received in the State during the preceding calendar year, *which payment was made for the privilege of having been permitted to enter Okla-*

homa and to do business therein during the then current license year. Said company is also required *to pay, on or before the last day of February of said succeeding license year,* a similar tax on all premiums, less proper deductions, which it receives in the State during the preceding calendar year, *for the privilege of having been permitted to enter Oklahoma and to do business therein during said succeeding license year,* and

(f) to agree to pay "all such [valid] taxes and fees as may at any time be imposed by law or act of the Legislature.

When the requirements set forth in paragraph (a), (b), (c), (d), (e), and (f), *supra,* have been met, the company is issued a license (see form of License on page 23 of record) entitling it to enter Oklahoma and do business therein from March 1st of the then current year, to and including the next succeeding last day of February of the ensuing year. Said license remains in effect until said date, that is, unless a refusal by said company to pay valid taxes or fees imposed upon it "by law or act of the Legislature," such as a refusal to pay valid advalorem taxes on its real or personal property, "shall work a forfeiture on such license" as provided in Section 1, Article 19, *supra.*

In connection with the issuance of *both said original and succeeding licenses* to a foreign insurance company it will be noted that under the provisions of Section 10478, *supra,* and of said section as amended (36 O. S. 1941 § 104), if the company fails to pay its annual premium taxes on or before the next succeeding last day of February, it

> "shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00),"

and if said failure continues for as much as sixty days after said date, it

> "shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

The provision last above quoted inferentially permits a delinquent company, such as is mentioned therein, to do business in Oklahoma for sixty days after said last day of February, *even though its license expired* as provided in the last portion of said Section 10477 (36 O.S. 1941 § 56) on said date, and inferentially authorize the Insurance Commissioner, if and when said company is so debarred, to revoke the license or certificate of authority of each of its agents in this State.

Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privilege

The fact that annual privilege taxes, such as are involved here, are paid after rather than before the exercise by a foreign insurance company of the privilege of entering a State and doing business therein during any license year, is immaterial. *This is especially true in Oklahoma since proof of the payment of said privilege taxes by a foreign insurance company is a condition*

precedent to the issuance of a license thereto for the ensuing license year.

In this connection, attention is called to the case of *Carpenter, Insurance Commissioner* v. *Peoples Mutual Insurance Co.* (Cal., 1937), 74 Pac. (2d) 508 (cited on page 48 of petitioner's brief), wherein the second paragraph of the syllabus is as follows:

> *"The payment of a privilege tax may precede exercise of privilege or follow it,* the choice of method being within legislative discretion, and where tax is proportionate to amount of business alone, *it is equitable that it be paid after conclusion of year in which privilege is exercised."*

In the case of *Sovereign Camp, W. O. W.* v. *Casados, et al.*, 21 Fed. Supp. 989 (D.C.-N.M. 1938), a three judge Federal District Court held in relation to a 1937 act of the State of New Mexico imposing an annual gross premium tax on certain foreign insurance companies of that State, as follows:

> "Clearly this is a tax imposed for the privilege of doing business within the State of New Mexico. *Payment of the tax is a condition precedent to the issuance of a license* by the proper authorities upon compliance with the laws of the state * * *
>
> *"* * * We, therefore, conclude that the tax paying date is immaterial. The date on which the license is renewed or granted is controlling, which is April 1, 1937."*

Attention is also called to the recent case of *Pacific Mutual Life Insurance Company* v. *Hobbs, Commissioner of Insurance,* (Kan., 1940), 103 Pac. (2d) 854

(cited on page 48 of petitioner's brief), wherein the syllabus is as follows:

> "1. Our statute G. S. 1935, 40-252, requiring foreign insurance companies at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, *imposes such taxes, payable at the end of the year, for the privilege of doing business in the state.*
>
> "2. The tax on gross premiums received by foreign insurance companies for business done in the state is an excise tax in the nature of a franchise or privilege tax on the privilege of doing business, *and partakes of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of such companies' certificates of authority.*"

In the body of the opinion of said case it is stated:

> "The tax is on the privilege of doing business in the state, — the tax is fixed at a percentage of premiums received during the preceding year. *The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient.*"

The fact that petitioner first entered Oklahoma after the annual two per cent premium tax law was enacted but before the 1941 annual four per cent premium tax law went into effect, is immaterial.

The fact that said annual privilege tax was raised from two to four percent *after* the petitioner insurance company was first licensed or permitted to do business in

Oklahoma in 1922 for the license year ending February 28, 1923, is immaterial. In this connection attention is called to the case of *Northwestern National Insurance Company of Milwaukee* v. *Lee* (D. C. Or.-1931), 49 Fed. (2d) 274, wherein the third paragraph of the syllabus is as follows:

> "Foreign corporation, permitted to enter state and engage in business, has right to invoke equal protection clause, *whether unjust discrimination arise under prior or subsequent legislation.*"

The Oregon law involved in said case required foreign fire insurance companies who were licensed to transact business in the State of Oregon to pay a $500.00 annual license fee for each agent it appointed in excess of one agent in cities of that state having a population in excess of 50,000 inhabitants. *Said law was in effect at the time said insurance company was first licensed to do business in the State of Oregon* but said fees were not paid to procure said company the right or privilege of doing insurance business in that state. In holding said law unconstitutional, the court held:

> "* * * *unless the $500.00 license fee imposed as a condition precedent to the employment of additional agents for the foreign insurance company is a condition precedent of a permit to the insurance company to do business in the state,* it is an unjust discrimination violative of the Fourteenth Amendment to the Federal Constitution. It is assumed * * * by the defendant herein in its brief, *that it is such a condition precedent,* and therefore justified. No reason is advanced in support of this assumption, and the only basis for such an assumption which occurs to us is that

the insurance company making application for license to transact insurance business in the state knows when it makes such application that the law under which the application is made does in fact provide that *if it desires to appoint more than one agent in each city, or two in Portland, it must pay the ddditional license fee.* But this is not sufficient to justify the discrimination against it and no case has been cited which goes to that extent. On the contrary, the courts with practical unanimity, hold that a foreign corporation, once having been permitted to enter into a state and engage in business, has a right to invoke the Fourteenth Amendment against unjust discriminations *whether they arise under legislation passed after its permit or before.* We think this is settled by the decision in *Liggett* v. *Baldridge*, 278 U. S. 105, 110, 49 S. Ct. 57, 58, 73 L. ed. 204, *as applied to legislation enacted subsequent* to the admission of the foreign corporation to do business, and in the case of *Quaker City Cab Co.* v. *Commonwealth*, 277 U. S. 389, 48 S. Ct. 553, 554, 72 L. ed. 927, *as to legislation* enacted before the foreign corporation was permitted to do business in this state."

This decision, which was cited with approval in *Springfield Fire and Marine Ins. Co.* v. *Holmes* (D. C. Mont., 1940), 32 Fed. Supp. 964-86, clearly holds that *for a discriminatory tax levied by a state against a foreign corporation to be valid it must be levied for the right or privilege of entering and doing business in the State and not for the right or privilege of thereafter performing some desired act therein, and that this is true whether or not the law levying the tax was enacted before or after the corporation entered the State and ac-*

quired the right or privilege of doing business therein. Therefore, if the annual privilege tax involved here is not levied for the right or privilege of entering and doing business in Oklahoma, it was invalid as to the petitioner, insurance company, even before it was increased from two to four per cent in 1941.

Gross Premium Tax Laws of Other States

As will hereinafter be shown the laws of at least 29 of the 48 states require the payment of *designated percentage taxes on premiums collected therein by foreign insurance companies* although no like or equalizing tax is required to be paid by competing domestic insurance companies. *However respondent has been unable to find a single case holding any of said laws invalid under either the 14th Amendment or any other constitutional provision, and petitioner has cited none.* Said laws have been in force, in many instances, far longer than the Oklahoma law involved here and apparently have been considered constitutional and valid by all foreign insurance companies adversely affected thereby.

In practically all of such statutes other annual fees, *similar to the annual "entrance fee" referred to in the second paragraph of Section 2, Article 19, supra, of the Oklahoma Constitution,* are collected from foreign insurance companies, but such collections have apparently not been treated by the courts or by the insurance companies as preventing said designated percentage taxes on premiums, although discriminatory, from also being collected.

Moreover, if the annual "entrance fee" mentioned in

said second paragraph are the sole fees or taxes paid by foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein, as contended by petitioner, it is clear, inasmuch as said fees are required to be paid at the beginning of each license year, that when such a company first (or subsequently) enters Oklahoma to do business therein, it does so for only one license year, and not, as also contended by petitioner, indefinitely.

In support of the statements above set forth as to discriminatory premium tax laws of other states, respondent respectfully calls attention to the booklet "Taxation Manual (1942-1943)," published by "The National Board of Underwriters" (a copy of which will be furnished the court upon request), which shows that in at least 29 of the 48 States foreign insurance companies are required to pay annual percentage taxes on premiums collected therein (as well as other annual fixed fees), although like or equalizing taxes are not collected from competing domestic insurance companies.

In this connection said booklet reveals that in the States listed below (the booklet is not clear as to certain States, hence same are not listed here), discriminatory percentage taxes on premiums are collected, as follows:

State	Percentage tax on premiums of foreign insurance companies.	Percentage tax on premiums of domestic insurance companies.
Ala.	2 ½ % Life; 1 ½ % Fire	1 %, less tax reduc. inv.
Ariz.	2 %	0
	2 ½ % Life, A & H.; 2 % Surety and Bond	0
Colo.	2 %. No tax if over 50 % of assets inv. in Colo. Bonds, etc.	Money on deposit, etc., reduce tax to 0 %.
Conn.	Reciprocal, except Co's of other Co's pay 2 %.	0
Fla.	3 % on W .C.; 2 % on other ins.	0
Ill.	2 %	0
Ind.	3 %, less losses.	0
Iowa	2 ½ %	0
Kan.	2 %	0
Ky.	2 %	2 % on W. C. only
Me.	2 %	0
Mass.	2 %, except ¼ of 1 % on net value of Life Ins.	¼ of 1 % on net value of Life Insurance.
Mich.	3 % on Fire, Marine and Auto; 2 % Cas. and Life	0
Miss.	3 %, except 2¼% on Life, H. & A. (Less tax inv.)	Diff. between ad val. tax and 50% foreign Co. tax
Neb.	2 %	0
N. H.	2 %	0
N. J.	2 %	0
N. M.	2 %	0
N. Dak.	2 ½ %	0
Ohio	2 ½ %	.002 % on Cap. & Sur. Opt. 8 ⅓ times Ohio prem.
Okla.	4 %, except on fraternals	0
Ore.	2¼%	0
Pa.	2 %	0
S. C.	5 ½ % on W. C.; 1 % on other insurance.	.008 %
S. Dak.	2 ½ %	1 %
Tenn.	2 ½ %	0
Wash.	2 ¼ %	1 %
W. Va.	2 %	0

The Philadelphia Fire Association Case

In determining the meaning and validity of the constitutional and stautory provisions of Oklahoma, heretofore quoted, especially those that impose an annual two per cent tax on the Oklahoma premiums of foreign insurance companies but not on the like premiums of competing domestic insurance companies, the intention of the Constitutional Convention and Legislature of Oklahoma in respectively adopting and enacting the same should be ascertained.

In this connection it must be presumed that said Convention and Legislature in adopting and enacting said provisions in 1907 and 1909 respectively, were cognizant of the fact that the Supreme Court of the United States had theretofore held in the case of *Philadelphia Fire Association* v. *New York* (1886), 119 U. S. 110, 30 L. ed. 342 (stressed by respondent in the trial and circuit courts but not referred to in petitioner's brief), *that a State law imposing an annual tax on the premiums collected in said State of a foreign insurance company but not on the like premiums of a competing domestic insurance company, did not violate the 14th Amendment of the Constitution of the United States if the tax was imposed for the right or privilege of entering the State and doing business therein during the succeeding license year.*

Inasmuch as said case was (and still is) the only decision of the Supreme Court of the United States on said question, it must be presumed that the principles of law announced therein were followed in the adoption and enactment of the constitutional and statutory provisions involved here. *In fact, it is inconceivable that the Okla-*

homa Constitutional Convention and 1909 Legislature intended to impose said annual two per cent premium tax in such a way as to make same unconstitutional, when a way had been pointed out in said decision to make said tax constitutional.

In this connection respondent quotes from the Philadelphia Fire Association case, as follows:

> "As early as 1853, the State of New York, by a statute, c. 466, required of every fire insurance company incorporated by any other state or any foreign government, as a prerequisite to doing business in the state, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a *designated public officer a certificate of authority* stating that the company had complied with all the requisitions of the statute; and *also required the renewal from year to year* of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, should furnish a renewal of the certificate of authority. A violation of the provisions was made a penal offense. This act, with immaterial amendments, is still in force.
>
> "This Pennsylvania corporation came into the State of New York [in 1872] to do business by the consent of the state, under this Act of 1853, *with a license granted for a year and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute.* The state, having the power to exclude entirely, has the power to change the con-

ditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. *If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshhold, seeking admission, with consent not yet given.*

"The Act of 1865 [the New York retaliatory law] had been passed when the corporation first established an agency in the state. The amendment of 1875 changed the Act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, *to the same license fee its own state might thereafter impose on New York companies doing business in Pennsylvania* [the Pennsylvania three per cent premium tax law was passed in 1873]: *By going into the State of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York.* It could not be of right within such jurisdiction, until it should receive the consent of the state to its entrance therein under the new provisions, *and such consent could not be given until the tax, as a license fee for the future, should be paid.*"

(Brackets supplied by respondent).

The above case was cited with approval in the case of *Home Indemnity Company of New York* v. *O'Brien* (C. C. A. Mich., 1939) 104 Fed. (2d) 413, apparently as authority for the proposition that a state has the power, by the passage of retaliatory legislation,

> "to protect its own domestic insurance companies doing business in other states from burdens, prohibitions and limitations placed upon them by taxes, license fees, deposits and similar measures."

In this connection it will be noted that if State laws providing for the payment by foreign insurance companies of annual discriminatory privilege taxes are illegal, as contended by petitioner, it would be wholly unnecessary for other States to enact retaliatory legislation in effect providing that insurance companies domiciled in States having such discriminatory laws and desiring to do business in said "other states" must, in order to do business therein, pay similar privilege taxes in said "other states."

Oklahoma (36 O. S. 1941 § 106) has a retaliatory law containing, among others, such taxation retaliatory provisions, said law being treated as valid in the case of *Read* v. *National Equity Life Insurance Co.*, 114 Fed. (2d) 977, in respect to its retaliatory policy writing provisions. Moreover, 40 of the 48 States have similar retaliatory laws. This is shown by the booklet "Taxation Manual (1942-1943)", heretofore mentioned.

Therefore, while Oklahoma insurance companies are favored in Oklahoma by reason of the fact that they are not required to pay said four per cent annual gross premium taxes on their Oklahoma premiums, they are required to pay similar taxes on any premiums they may collect in 40 of the *other* 47 States.

The New York Life Insurance Company Case

The above constitutional provisions, as well as Section 10478, O. S. 1931 (Section 6687, C. O. S. 1921),

supra, were construed in the case of *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County* (Okla. 1932), 155 Okla. 247, 9 Pac. (2d) 936. In said case, which is referred to briefly on page 41 of petitioner's brief, the Oklahoma Supreme Court held that the two per cent tax on the Oklahoma premiums of the New York Life Insurance Company was a proper "license fee, or privilege tax" charged said company "for the right or privilege to do business" in Oklahoma.

In this connection respondent, for the information of the court, quotes certain pertinent parts of said decision as follows:

> "Percentage on the income or receipts, by agents of foreign insurance companies, *imposed for the privilege of carrying on their business, is not a tax within a constitutional* sense. Desty, American Law Taxation, p. 229 * * *
>
> "The state reserves the right to prohibit foreign insurance companies from doing business within the state, and it may regulate, prescribe, and impose any burdens, terms, or conditions it chooses, reasonable or unreasonable, *in giving its assent to such corporation to engage in business within the state.*
>
> "In the case at bar *no lump sum* is designated as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that a certain percent of the premiums collected by a foreign insurance company *is an equitable mode of determining what burdens, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state.*"

It will be noted from the last paragraph above quoted that the Oklahoma Supreme Court expressly held that "no lump sum" is designated by the constitution and laws of Oklahoma "as a license fee or privilege tax for the purpose of transacting business out of the State". Said paragraph clearly shows that said Court considered the annual two per cent premium tax set forth in the third paragraph of Section 2 of Article 19 of the Oklahoma Constitution, and not the definitely fixed schedule of fees set forth in the second paragraph of said section, as being charged for the right or privilege of entering Oklahoma and doing business therein.

Moreover, when said court held in the above case that the payment by a foreign insurance company of *said annual two per cent premium tax* was not in lieu of ad valorem taxes on its personal property, and that such a company (like a competing domestic company) must pay ad valorem taxes on its personal property in this State, it was undoubtedly aware that said premium tax (there being no like or equalizing tax paid by competing domestic insurance companies), discriminated heavily against foreign insurance companies. Therefore, unless said court was of the opinion that said annual two per cent premium tax was a tax or fee *for the right or privilege of entering Oklahoma and doing business therein during the year for which same was paid*, it would not have considered or treated said tax as constitutional and valid. It was, therefore, necessary, and not merely *dicta*, for the court to hold that said annual two per cent premium tax was charged:

> "for the right or privilege to do business within the state."

The Lincoln National Life Insurance Company Case

Inasmuch as the Honorable Lucius Babcock, Judge of the District Court of Oklahoma County, Oklahoma, on September 8, 1942 handed down his written decision (R. 35-38) in the case of *Lincoln National Life Insurance Company* v. *Jess G. Read, Insurance Commissioner of Oklahoma, et al.*, No. 105488, District Court of Oklahoma County (the first cause of action of said case being essentially identical to the cause of action set forth in petitioner's original complaint), in which decision he construed the meaning of the constitutional and statutory provisions of Oklahoma involved in this case in relation to issues identical to those involved in the instant proposition, and since neither of the appellate courts of Oklahoma have construed said provisions in relation to such issues (although the New York Life Insurance Company case, *supra*, referred to in said decision, is in harmony therewith), *Judge Babcock's said decision* (which was on March 8, 1943 appealed to the Oklahoma Supreme Court where it has been briefed and submitted), in so far as the meaning of said constitutional and statutory provisions are concerned, should be considered, as will hereinafter be shown, as binding on (or at least highly persuasive by) this Court, although it is otherwise as to that part of said decision which holds that said provisions, as so construed, do not violate the 14th Amendment of the Constitution of the United States.

Respondent, therefore, respectfully asks the Court to carefully examine and consider Judge Babcock's said decision, especially paragraphs (a) and (b) thereof.

(R. 36-37) which specifically relate to said first cause of action.

While it is true that the above decision (same being the only applicable Oklahoma District Court decision) is not that of an appellate court of this State (although such district courts exercise certain final as well as intermediate appellate powers), it is a decision of a constitutional trial court having "general jurisdiction" in the State of Oklahoma, (*Samuels* v. *Granite Savings Bank & Trust Company*, 150 Okla. 174, 1 Pac. (2d) 145) and which is "endowed with the dual power of a court of equity and a court of law" (*Wentz* v. *Thomas*, 159 Okla. 124, 15 Pac. (2d) 65), and hence has judicial powers essentially the same as those exercised by the Court of Chancery of the State of New Jersey.

In this connection it will be noted by an examination of Article 6 of the Amended Constitution of New Jersey and Title 2, Sub-title 1, Chapter 2 of the 1937 Revised Statutes thereof, that the Court of Chancery of said state does not exercise appellate or intermediate appellate jurisdiction, but that said court, acting through Vice-Chancellors sitting in prescribed districts of the state, acts as a trial court in chancery or equity cases, and that it is expressly provided in said chapter that when any:

> "cause or matter is referred to a Vice-Chancellor, he may take and hear the evidence of witnesses therein orally, in the same manner as evidence is taken and heard in the several courts of law in this state on trials by jury."

It is, therefore, important to note that in the recent case of *Fidelity Union Trust Company, et al.*, v. *Field*,

311 U. S. 169, 85 L. ed. 109, it was held that a decision of a Vice-Chancellor of the Court of Chancery of the State of New Jersey construing a statute of that state was binding not only on a United States District Court sitting in said state as to the meaning of said statute but upon the United States Circuit Court of Appeals. In this connection we quote the syllabus of said case, as follows:

> "Decisions of the Chancery Court of New Jersey, in two cases decided independently, in which the Vice-Chancellors reach the same conclusion with respect to the proper construction to be given a state statute, relating to trust deposits in banks, are binding on Federal courts in cases involving the efficacy of declarations of trust and gifts of bank deposits, where such decisions have not been reviewed by the Court of Errors and Appeals of New Jersey, although decisions of the Chancery Court are not always followed by the Supreme Court of New Jersey or even by the Chancery Court itself, and may, of course, be disapproved at any time by the Court of Errors and Appeals.
>
> "It is the duty of a Federal court, when bound by state law, to ascertain and apply that law even though it has not as yet been expounded by the highest court of the state."

By an examination of the two decisions of the Court of Chancery of New Jersey, above referred to, same being *Thatcher* v. *Trenton Trust Company*, 119 N. J. Eq. 408, 182 Atl. 912, and *Travers* v. *Reid*, 119 N. J. Eq. 416, 182 Atl. 908, it will be found that the decisions of the Vice-Chancellors therein were written, as the decision of Judge Babcock in this case was written, in relation to original trials of the actions involved therein. Said

decisions were followed by the United States District Court which tried the Fidelity Union Trust Company case but were not followed by the United States Circuit Court of Appeals, said latter court accordingly reversing the judgment of the United States District Court which followed said decisions. *In this connection this court* held:

"We think that this ruling was erroneous."

The Great Northern Life Insurance Company Case

The case of *Great Northern Life Insurance Company* v. *Read, Insurance Commissioner of the State of Oklahoma*, 136 Fed. (2d) 44, fully supports the instant proposition. It is from said decision that this appeal is taken. However, as said decision is quoted in full on pages 39 to 46 of the record herein, respondent deems it unnecessary to further discuss said decision here.

The Hanover Fire Insurance Company Case

In the case of *Hanover Fire Insurance Company* v. *Carr, Treasurer* (formerly Harding, Treasurer), 272 U. S. 494, 71 L. ed. 372 (referred to on pages 41, 42, 44, 45, 47 and 56 of petitioner's brief), the first and third paragraphs of the syllabus are as follows:

"1. A state may not exact as a condition of a corporation doing business within its limits that its rights secured by the Constitution of the United States may be infringed.

"3. An inequality between a domestic corporation and a foreign corporation *with respect to the securing by it of the right to do business within the state* does not come within the inhibition of

the Federal Constitution against deprivation of the equal protection of the laws."

Inasmuch as the Hanover case, is the decision upon which petitioner places its chief reliance here, same will be fully discussed by respondent. However, before doing so we desire to call attention to the salient fact, as will hereinafter be shown, that while said case held that the *net receipts tax of Illinois*, as construed by the Illinois Supreme Court in 1923, was discriminatory and invalid, it in effect held that the 1919 *two per cent annual gross premium tax of Illinois* (same being essentially the same as the tax involved here) was a tax paid for the right or privilege of doing business in said state for the ensuing year and was hence valid even though discriminatory.

Moreover, petitioner wholly fails to consider in its brief the pertinent fact that while the 1919 act was passed long after the Hanover Fire Insurance Company first entered the State of Illinois, the annual two per cent premium tax levied thereby, even though discriminatory, was held valid as to said company under the theory that same was a tax for the right or privilege of annually entering said state and doing business therein during the succeeding license year.

In this connection the Hanover case reveals that in 1869 the State of Illinois passed a law relating to the domestication of foreign insurance companies in Illinois. Section 30 of said Act, which was immaterially amended in 1879, operated to annually levy the regular ad valorem tax on the *net receipts* of such companies during the prior year. Section 22 of said 1869 law provided for the admission and regulation of such a company, required

local agents thereof to secure annual certificates of authority from the Director of Trade of said state showing that the company had complied with the law "which applied to it," and also required the company to pay $30.00 for its charter, $10.00 with its annual statement and $2.00 for each agent's certificate of authority. The payment of the *net receipts tax* provided for in Section 30 was in no way a condition precedent for said company to enter the State of Illinois and to do business therein. No similar tax was required of domestic corporations, but both foreign and domestic corporations were required to pay the regular ad valorem tax upon their real and personal property.

The computation of the regular ad valorem tax in Illinois on personal property was in theory upon fifty per cent of the actual value thereof, but as a matter of practice said fifty per cent was debased to thirty per cent, hence personal property in Illinois was actually only taxed on thirty per cent of its actual value. Said *net receipts tax*, being considered a tax upon personal property, was debased to thirty per cent of said net receipts and said ad valorem tax computed thereon. This procedure was followed from 1869 to 1923, when the Supreme Court of Illinois held that said ad valorem tax should be levied upon the full amount, rather than upon this debased amount, of the *net receipts*, of a foreign insurance company.

Prior to said holding and in the year 1919, the Legislature of Illinois passed a law requiring foreign insurance companies to pay an annual state tax for the privilege of doing an insurance business in Illinois equal

to two per cent of the gross amount of the premiums received thereby during the preceding year, but said law did not repeal or supersede said prior net receipts tax law.

It is significant to note that this annual two per cent premium tax, which was levied for a purpose similar to that of the tax involved here, has never been protested by foreign insurance companies doing business in Illinois, and it is specifically stated in the Hanover case that the Hanover Fire Insurance Company had paid said tax.

It was also the contention of the Illinois court in its 1923 decision *that while payment of said annual net receipts tax was not a condition precedent for said company to enter said state,* that since its agents were required by Section 22 of the 1869 Act to procure annually from the insurance superintendent a certificate of authority stating that the company had "complied with all the requirements" of said Act, and since payment of said net receipts tax was a part of said requirements, said tax was levied as compensation for the privilege of *continuing* "to do business in said state" and was hence valid even though discriminatory.

The Hanover Company did not object to the payment of said *net receipts tax* until the Supreme Court of Illinois held in 1923, as aforesaid, that same should be computed upon the actual amount of net receipts and not upon the debased value thereof. After this decision said company refused to pay the full amount of said *net receipts tax* and filed action to enjoin the collection of a tax warrant therefor.

This court held that said tax, as so computed, was discriminatory and invalid. In so holding the court, after citing cases to the effect that a State cannot as a condition precedent to the admission of a foreign corporation to do business therein validly require the corporation to surrender rights guaranteed to it by the Federal Constitution, such as a right derived under the Commerce Clause or the right to remove an action brought against it to a Federal Court, *had this to say in relation to the validity of State taxes under the 14th Amendment*:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a change violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state *for license or privilege to do business in the state* and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. *With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment;* but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind * * *.
>
> "*What, therefore, we have to decide here is whether the application of section 30 can be one of the*

conditions upon which the insurance company is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character.

*"It is plain that compliance with section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, * * *."*

By the above language this court in effect held that while said *net receipts tax*, as construed by the Illinois court in 1923, was an "occupation tax" or a "privilege tax," same was not paid "for the license or privilege to do business in the state," and that the Illinois court conceded that compliance with said Section 30, to-wit: payment of said net receipts tax,

> "is not a condition precedent to permission to do business in Illinois."

This court also in effect held that said 1919 *two per cent annual gross premium tax, same being analogous to the tax involved here, was a tax for the right or privilege of doing business in Illinois for the ensuing year and hence valid.* It will be here noted that the court held that while the license construed in the Greene case, hereinafter mentioned, "was indefinite", the license construed in the Hanover case "must be renewed from year to year." This is shown by the following excerpt from the Hanover case, to-wit:

> "In the Greene case the license was indefinite. In this case it must be renewed from year to year, but

> the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licenses unconstitutional burdens."

The above quoted language *is in harmony* with the holding of this court in *Philadelphia Fire Association* v. *New York, supra,* and reveals that the licensing provisions of law, such as the Illinois law construed in the Hanover case, only permit a foreign insurance company to do business in the licensing state for one year. It was probably for this reason that the 1919 two per cent annual gross premium tax law of Illinois, which, as stated in the Hanover case,

> "* * * provided that each non-resident corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privilege of so doing, equal to two per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the state after certain reductions; * * *"

was treated as valid by this court, and said annual two per cent gross premium tax, both before and since said decision, been paid without question by foreign insurance companies doing business in Illinois.

In the Hanover case the court cited with approval the case of *Southern Railroad Company* v. *Greene,* 216 U. S. 400, 54 L. ed. 536 (referred to on pages 52 and 53 of petitioner's brief), as follows:

> "* * * a railway corporation of another state had come into Alabama and secured a license to do business therein as an intrastate railway and in course of that business had acquired in the state

> property of a fixed and permanent nature upon which it had paid all the taxes levied by the state. It was held that a *new and additional franchise tax* for the privilege of doing business within the state, not imposed upon domestic corporations doing business in the state of the same character, violated the equal protection clause."

It will be here noted that the two per cent (now four per cent) gross premium tax involved in this case is not a "new and additional franchise tax," but that same is an *annual privilege tax* which every foreign insurance company must pay which desires to do business in Oklahoma during the succeeding license year. The mere fact that said tax was fixed at two per cent by Section 2, Article 19, *supra*, "until otherwise provided by law," and has in 1941 raised by law to four percent, does not mean that said tax is not, as stated in the New York Life Insurance Company case, supra,

> "a privilege tax for the purpose of transacting business within the state."

The Hanover case was followed in the case of *Sneed, Treasurer* v. *Shaffer Oil and Refining Company, et al.*, (C. C. A. 8th Cir., 1929), 35 Fed. (2d) 21 (referred to on page 52 of petitioner's brief), wherein it is held that an Oklahoma law then enforced by the Oklahoma Corporation Commission, levying an annual *discriminatory corporation license tax* upon foreign corporations which had *theretofore received* (like the railway company in the Greene case, *supra*), an *"indefinite license" to do business in Oklahoma from the Oklahoma Secretary of State*, was invalid under the 14th Amendment of the Constitution of the United States. Said case is not in

point here since a foreign insurance company receives no license whatsoever from the Oklahoma Secretary of State (*see State* v. *Prudential Ins. Co., et al.*, 180 Okla. 191, 68, Pac. (2d) 852), *and the only license or permit it receives is a license from the Oklahoma Insurance Commissioner to do business in Oklahoma for one license year.*

FIFTH PROPOSITION

THE OKLAHOMA INSURANCE COMMISSIONER DID NOT MAKE AN UNCONSTITUTIONAL OR IMPROPER APPLICATION OF THE 1941 ACT BY REASON OF THE FACT THAT HE REQUIRED FOREIGN INSURANCE COMPANIES SEEKING TO OBTAIN A LICENSE TO DO BUSINESS IN OKLAHOMA FOR THE YEAR 1942, TO PAY A FOUR PER CENT TAX ON ALL PREMIUMS, LESS PROPER DEDUCTIONS, COLLECTED BY SAID COMPANIES IN OKLAHOMA DURING THE YEAR, 1941.

On pages 53 to 57 of petitioner's brief the converse of the above proposition is presented. However, in connection therewith attention is called to Section 10478, O. S. 1931 (enacted in 1909), as amended by Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), the material part of which is as follows:

> "Every foreign insurance company * * * doing business in the State * * * shall, annually, *on or before the last day of February*, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner,

> the total amount of gross premiums received in this State *within the twelve months next preceding the first of January*, or since the last return of such premiums was made by such company; and shall, *at the same time*, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, *and an annual tax of four per cent on all premiums collected in this State*, after all cancellations and dividends to policy holders are deducted * * *."

The only effect of said amendment, which went into effect on April 25, 1941, was to increase said annual premium tax from two to four percent. It, therefore, appears that a foreign insurance company doing business in Oklahoma for the license year ending February 28, 1942, is required to pay a four cent tax on all premiums, less proper deductions, which it collected in Oklahoma during the year 1941, and that this is true even though the 1941 Act did not go into effect until April 25, 1941. In support of this conclusion attention is called to the case of *Du Laney, Insurance Com'r.* v. *Continental Life Ins. Co.* (Ark., 1932), 47 S. W. (2d) 1082, wherein the fourth paragraph of the syllabus is as follows:

> "Statutory amendment increasing tax on gross premium receipts of certain insurance companies held to disclose legislative intent that statute should apply to gross premiums receipts for entire year 1931, *although practically one-half of fiscal year of 1931 had expired before act became effective.*"

In the case of *Sovereign Camp W. O. W.* v. *Casados, et al.*, 21 Fed. Supp. 989, heretofore referred to, the seventh paragraph of the syllabus is as follows:

"An amendment to statute under which benefit societies were licensed to do business in New Mexico imposing privilege tax on basis of gross premiums collected during preceding year *as a condition precedent to issuance of license on April 1, 1937*, when societies' licenses expired was not invalid as operating retrospectively, since societies had no greater right to do business in state than that granted by statute as amended."

In the body of the opinion appears the following language:

"Clearly this is a tax imposed for the privilege of doing business within the state of New Mexico. *Payment of the tax is a condition precedent to the issuance of a license* by the proper authorities upon compliance with the laws of the state.

"* * * it was the intent of the Legislature that the act should be effective and the tax computed on the basis of the gross premiums collected by the respective companies during the preceding year, to-wit 1936, *as a condition precedent to the issuance of license on April 1, 1937*, to do business during the ensuing year. The act became a law on March 6, 1937. The tax is provided to be paid on March 1, 1937. Complainants had no license to do business in the state of New Mexico after April 1, 1937.

"* * * We, therefore, conclude that the tax paying date is immaterial. *The date on which the license is renewed or granted is controlling*, which is April 1, 1937. Chapter 69, supra, was the law of the state of New Mexico *at that time* and the complainants are required to comply with the provisions of chapter 105, Session Laws of New Mexico 1931, as amended by chapter 69 of the Session

Laws of New Mexico 1937, *as a condition precedent to the renewal or the granting of license,* which expires on April 1, 1937."

Before concluding this portion of our brief respondent desires to again call attention to the case of *Pacific Mutual Life Ins. Co. v. Hobbs, Com'r. of Insurance* (Kan., 1940), 103 Pac. (2d) 854. The syllabus of said case is as follows:

"1. Our statute G. S. 1935, 40-252, requiring foreign insurance companies, at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, *imposes such taxes, payable at the end of the year, for the privilege of doing business in the state.*

"2. The tax on gross premiums received by foreign insurance companies for business done in the state is an excise tax in the nature of a franchise or privilege tax on the privilege of doing business, *and partakes of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of such companies' certificates of authority.*"

The principles of law above announced, while in harmony with those set forth in the third proposition of this brief, *are not controlling as to the issue involved in the instant proposition.* However, in the body of the opinion of the above case certain statements are made that do support the same. In this connection it will be noted that the plaintiff company in said case unsuccessfully asked for a writ of Mandamus requiring the Insurance Commissioner of Kansas to refund certain premium

taxes paid by it under protest in January, 1937 under the theory:

> (a) that the laws of said State required such taxes, although computed on premiums collected during the preceding year, to be paid for the privilege of doing business in Kansas during the ensuing year, and
>
> (b) that since the company whose business it had taken over under an assumption agreement in July, 1936, had paid in January of said year a tax for the privilege of doing business in Kansas during the year 1936, the plaintiff company could not be required to pay a tax on premiums collected by said company prior to July, 1936.

In refuting said theory the Kansas court held:

> "The tax is on the privilege of doing business in state, — the tax is fixed at a percentage of premiums received during the preceding year. The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient.
>
> *"Upon the theory advanced by the plaintiff a foreign company coming into the state would be exempt from taxation upon the business done in the first year, if it withdrew at the end of the first year.* It is not to be presumed the legislature intended to exempt a foreign insurance company from taxation upon its first year's business.
>
> "In support of the suggestion that the tax is prospective privilege tax, counsel rely on *McNall* v. *Insurance Co., supra.* That case arose shortly after the original premium-tax statute was enacted. The insurance company had been doing business in the state before the law was passed. The vital

question before the court was formulated in the first paragraph of the opinion which reads (65 Kan. 694, 70 Pac. 605): 'It is insisted by counsel for defendant in error that the law set forth in the statement was given retroactive effect by the collection, under its authority, of taxes from the insurance company for the year 1899, based on business done in 1898, and that in fact the tax was on insurance written before the law was passed. *With this contention we do not agree.*'"

It will thus be noted that the Kansas court, while holding *in the case there under consideration* that the premium tax of that state was collected at the end of the license year for the privilege of doing business in Kansas during said year, also held *in said cited case* that since said tax was required to be paid as a condition precedent to securing a license to do business in Kansas during the ensuing license year, a company seeking a license shortly after said law went into effect had to pay said tax on all of the premiums it had collected during the prior year, even though part thereof were collected before said law went into effect.

CONCLUSION

In consideration of the five propositions, above presented, respondent respectfully asks the Court to affirm the decisions of the District and Circuit Courts herein, and to render judgment in favor of respondent and against petitioner.

Respectfully submitted,

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